

E-Filed 7/21/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EBONE LEROY EAST,
Plaintiff,

No. C 11-00826 RS (PR)

ORDER OF DISMISSAL

v.

WALKENHORSTS,
Defendant.

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The original complaint was dismissed with leave to amend. The Court now reviews the amended complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may

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1 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
 2 § 1915A(b)(1),(2). *Pro se* pleadings must be liberally construed. *See Balistreri v. Pacifica*
 3 *Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

4 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
 5 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
 6 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
 7 plausibility when the plaintiff pleads factual content that allows the court to draw the
 8 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
 9 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
 10 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
 11 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).
 12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
 13 (1) that a right secured by the Constitution or laws of the United States was violated, and
 14 (2) that the alleged violation was committed by a person acting under the color of state law.
 15 *See West v. Atkins*, 487 U.S. 42, 48 (1988).

16 **B. Legal Claims**

17 Plaintiff alleges that defendant Walkenhorsts, a private company under contract with
 18 the California Department of Corrections to provide canteen items to California prisons,
 19 infringed on his copyright by listing a work by plaintiff in its catalogue without his
 20 permission. Under the facts alleged in the complaint, this defendant cannot be sued under
 21 42 U.S.C. § 1983. Specifically, plaintiff does not allege that defendant acted under color of
 22 state law, a requirement under § 1983. Action taken by a private organization may be under
 23 color of state law “if, though only if, there is such a close nexus between the State and
 24 the challenged action that seemingly private behavior may be fairly treated as that of the
 25 State itself.” *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288,
 26 295 (2001) (internal quotations omitted). The Supreme Court has found state action when a
 27 challenged activity results from the state’s exercise of coercive power, when the State
 28

1 provides significant encouragement for the activity, or when a private actor operates as
2 a willful participant in joint activity with the State. *See id.* In both the original and amended
3 complaints, plaintiff alleges no specific facts suggesting that defendant's conduct could fairly
4 be treated as conduct of the state itself. Furthermore, because plaintiff alleges purely private
5 conduct by defendant, such allegations do not meet the standards for cognizable claims under
6 § 1983. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (a private citizen does not act under
7 color of state law, an essential element of a § 1983 action). Accordingly, the action is
8 DISMISSED. The Clerk shall enter judgment in favor of defendant, and close the file.

9 **IT IS SO ORDERED.**

10 DATED: July 21, 2011


RICHARD SEEBORG
United States District Judge